

2007

Does Security Trump Trade

Dunniela Kaufman

Recommended Citation

Dunniela Kaufman, *Does Security Trump Trade*, 13 LAW & BUS. REV. AM. 619 (2007)
<https://scholar.smu.edu/lbra/vol13/iss3/6>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

DOES SECURITY TRUMP TRADE?

*Dunniela Kaufman**

THIS paper was written to facilitate a panel discussion under the same title at the ABA's fall meeting 2006. It was a collaborative work done by Fraser Milner Casgrain LLP's (FMC) international trade group, as coordinated by Dunniela Kaufman.

I. SUMMARY

While security concerns have always been recognized as legitimate areas in which sovereign states, either unilaterally or in concert with other states, may adopt measures or pursue goals that may run counter to trade liberalization, the paradigm radically changed following the events of September 11, 2001. Prior to September 11, trade liberalization and multinational cooperation were the driving objectives behind international agreements affecting trade. While trade and security considerations were very often linked in these agreements, trade remained the primary focus of the agreements, and security considerations manifested themselves primarily in the form of permitted derogations from the primary objective, to liberalize trade.

Some of the developments of the past five years may have occurred with or without September 11, as the natural result of a world in which the interests of member states of international trade agreements are as divergent as ever, and the trade disputes between these states are polarized as ever. But September 11 looms as the most significant cause of the paradigm shift—in which the resources of key players such as the United States have been focused on security-based initiatives, in which trade liberalization and trade facilitation are secondary goals and many of the specific features of these initiatives have the potential to impede trade. Many argue that in this new era multilateralism and positive agendas have been replaced with regionalism, unilateralism, and reactive approaches to seeking solutions.

This paper will explore this paradigm shift, and its potential implications in the context of the Security and Prosperity Partnership (SPP). The SPP is a trilateral initiative that was launched in March 2005 by the

* Dunniela is a senior associate in FMC's international trade group. As a member of the British Columbia, Ontario and New York Bars, Dunniela has a comprehensive cross border practice that focuses on facilitating transactions into Canada. Further, her expertise in government relations assists FMC's multi-faceted international trade group in providing clients involved in trade disputes or dealings with government agencies on trade-related matters achieve quick and positive results.

United States, Canada and Mexico to "increase security and enhance prosperity . . . through greater cooperation and information sharing."¹ We conclude that while the framers of the SPP have touted the initiative as trade-enhancing and have claimed that it was not intended to supplant the North American Free Trade Agreement (NAFTA), it has the potential to be more trade-restrictive than trade enhancing and a number of its provisions have the potential to supplant similar NAFTA provisions.

A. SECURITY AND TRADE IN HISTORY

The link between trade and security has long been an issue of deep socio-economic interest. For example, the colonial wars pursued by the European powers in the nineteenth century were aimed at, *inter alia*, exploiting the gains from cross-border trade. A more concrete example is the protectionist wave in the latter half of the nineteenth century. After a period of enhanced trade relationships in the 1850s and 1860s, trade suffered an abrupt reversal towards protectionism when Europe experienced dramatic recession as well as increased competition from non-European grain producers. In 1879, Germany retreated from the principle of free trade as Bismarck decided to raise tariffs substantially in order to preserve the economic security of the country.²

In the North-American context, Canadian economic integration with the United States can be traced back to 1854 when Canada and the United States signed the Elgin-Marcy Reciprocity Agreement. This Agreement secured trade for Canadian agricultural products and raw materials into the U.S. market in exchange for U.S. access to fishing rights. A more recent manifestation of the tension between trade and security concerns is the imposition of embargoes, which are designed to achieve political goals, and address what may be perceived as security threats with an extra-territorial dimension. An example of such a government measure is the U.S. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (better known as the Helms-Burton Act).³ The introduction of the Act was largely prompted by an event that happened on February 24, 1996, when Cuban fighter jets shot down two private planes operated by a Miami based anti-Castro Cuban refugee support group called Brothers to the Rescue (*Hermanos al Rescate*). Governments and businesses in other countries argued that the Act ran counter to the spirit of international law and sovereignty because it contained provisions that sought to punish non-U.S. companies for engaging in trade with Cuba. The extraterritorial aspect of this measure was condemned by the Council of Europe, the European Union, Canada, Mexico, Argentina and other U.S. allies that enjoy normal trade relations with

1. SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA, <http://www.spp.gov> (last visited Mar. 25, 2007).

2. PAUL BAIROCH, *European Trade Policy, 1815 – 1914*, in 8 THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE 51–52 (Peter Mathias & Sidney Pollard eds., 1989).

3. Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. § 6021 (2000).

Cuba. The European Union even commenced a complaint with the World Trade Organization.⁴ Because the Helms-Burton Act had extra-territorial implications for Canada, the Canadian Parliament enacted legislation to counter the U.S. legislation, as it impeded or reduced trade or commerce between Canada and Cuba.⁵

From the end of World War II until the end of the Cold War, the world, for the most part, was divided on the basis of ideological grounds. These ideological grounds were premised on a distinction that at its heart was economic. While trade between the separate and distinct blocs progressed during this time period, it was not until the Cold War ended that there appeared to be global consensus regarding the benefits of free trade, which inherently require free market regulation.

After the end of the Cold War, and in view of the burgeoning technological advancement towards the end of the twentieth century, there was general optimism that globalization, and correspondingly free trade, would eventually cause borders between nations to become irrelevant. But the events of Sept. 11, 2001, ushered in a new normal and the idea that borders may one day become irrelevant now seemed a distant memory. North America was now focused on securing borders. As nations grappled with a new sense of insecurity, the economic interdependence created by successive free trade agreements had to find a way to survive. In North America, finding a way to facilitate the free trade of goods and services in the new normal has been made a priority from day one, albeit always a subservient one. On December 12, 2001 Canada and the United States signed the Smart Border Accord, which contained a thirty-point plan aimed at ensuring security while simultaneously allowing for the free trade of goods and services.⁶ The Accord is an example of a reactive measure prompted primarily by the culture of fear alluded to in the introductory part of this paper.

While the governments of Canada and the United States undertook immediate efforts to ensure the border continued to function, a year after these governments launched the Smart Border Accord, the private sector called for further action. In January 2003, the Canadian Council of Chief Executives (CCCE) published its North American Security and Prosperity Initiative (NAPSI).⁷ This initiative proposed a strategy with five ma-

4. The work of the dispute settlement panel was suspended to find a solution through negotiations. After a year, the panel lost its jurisdiction over the matter, and the EU did not pursue the matter anymore before the WTO.

5. Foreign Extraterritorial Measures Act, R.S.C., ch. F-29 (Can. 1985).

6. Canada-U.S. Smart Border Declaration, <http://www.dfait-maeci.gc.ca/anti-terrorism/declaration-en.asp> (last visited Mar. 25, 2007).

7. The Canadian Council of Chief Executives (CCCE) is a not-for-profit, non-partisan organization composed of the CEOs of some of Canada's leading enterprises. The CCCE engages in public policy research, consultation and advocacy on behalf of its members. Security and Prosperity Toward a New Canada—United States Partnership in North America (January 2003), available at http://www.ceocouncil.ca/publications/pdf/716af13644402901250657d4c418a12e/presentations_2003_01_01.pdf.

for elements, “[r]einventing borders, [m]aximizing regulatory efficiencies, [n]egotiation of a comprehensive resource security pact, [r]einventing the North American defence alliance [and] [c]reating a new institutional framework”⁸ In setting out these major elements, the CCCE called on the parties to the NAFTA “to create a zone of cooperation encompassing the continent rather than focusing security efforts on the line that separates us.”⁹

Two years after the CCCE published its NAPSI, in March 2005, the NAFTA parties’ launched the North American Security and Prosperity Partnership.¹⁰ The SPP was designed to establish and develop a cooperative approach to advancing common security and prosperity and to ensure that these seemingly opposed objectives become mutually reinforcing. To that end, the SPP provides a mechanism to advance collaboration in the areas of security, trade facilitation, transportation, environment and public health. Contrary to the calls by the CCCE, the SPP does not create a new institutional arrangement. In fact, it is neither an international agreement nor a treaty. It is merely a framework for dialogue. As a flexible arrangement that attempts to develop a collaborative approach, the SPP allows for bilateral discussions and initiatives, presumably to address the distinctions in pressing matters that arise bilaterally between the trilateral group.

It is generally understood by the private sector that they need to continue to work with government in a coordinated fashion to identify, develop and implement policies that support important security measures while simultaneously ensuring economic growth and global opportunities. In forcing governments to focus on the functioning of their borders, some have suggested that the result is actually more effective processes; thus the question becomes, does security trump trade in the twenty-first Century, or does it actually facilitate it?

B. THE MAIN THESIS

The concept of security lends itself to a two-faceted analysis. From a broader perspective, security is to be pursued on a global scale. In this sense of the term, protected borders is not necessarily synonymous with a secure country since security threats do not recognize national borders. In other words, border security does not ineluctably translate into socio-economic security. A terrorist attack in Nigeria or a geopolitical crisis concerning Iran may lead to convulsions in the oil and stock markets across the world.

8. Canadian Council of Chief Executives, North American Security and Prosperity, <http://www.ceocouncil.ca/en/north/north.php> (last visited Mar. 25, 2007).

9. Canadian Council of Chief Executives: Reinventing Borders, <http://64.26.159.96/en/north/reinventing.php> (last visited Mar. 25, 2007).

10. Press Release, Joint Statement by President Bush, President Fox, and Prime Minister Martin (Mar. 23, 2005) (<http://www.whitehouse.gov/news/releases/2005/03/20050323-2.html>).

In its more limited form, security is canvassed merely as border security. When viewed as such, the tension between security measures and trade flows is apparent. The very idea of trade regulation is premised on the alleviation or removal of obstacles to the flow of goods and people across a sovereign nation's borders. Conversely, the goal of border security measures is to create border screening mechanisms designed to prevent certain categories of people and goods from entry. Such mechanisms are intrinsically liable to impose another obstacle to trade along with the traditional protectionist driven forms of restrictions such as tariffs and quotas. This presentation will endeavour to inquire into the practical dimensions of this *prima facie* theoretical discrepancy.

On their face, the SPP statements and policy documents claim that there is no readily discernible conflict between the overarching goals of achieving security and enhancing trade. For example, it is assumed that regulatory compatibility leads to safer and faster trade, and that "border strategy . . . results in the fast, efficient and secure movement of low-risk trade and travelers to and within North America."¹¹ The question, however, is, how will this rhetoric be implemented in practice? For instance, what would be the extent of the regulatory cooperation and is it going to lead to more costly regulatory burdens on exporters? How will the term trusted/legitimate travellers be defined and will it exclude a portion of legitimate travellers due to inadequate procedures? What is the degree of border congestion that would be precipitated by the SPP security measures? These questions can only be answered after thorough observation of the next steps under the SPP.

In the context of the new SPP, the geopolitical issue with perhaps the most significant implications for the future of North America is the relationship between the Partnership and the NAFTA within the framework for trilateral co-operation. The NAFTA and the SPP represent the two visions for economic integration introduced in the opening remarks of the paper. The NAFTA embodies the proactive approach towards trade liberalization, whereas the SPP is an attempt to reconcile the positive goal of integration with the reactive objective of responding to the perils of terrorism.

At present, the SPP has gained the political momentum to be the major vehicle for North-American integration, thereby calling into question the relevance of the NAFTA. This phenomenon is occurring at a time when the NAFTA, and most specifically its dispute mechanism, has come into question, especially in light of the softwood dispute. While the leaders of Canada, United States and Mexico claim that the SPP does not seek to rewrite or renegotiate the NAFTA and creates no NAFTA-plus legal status, given some of its areas of focus, such as standards and rules of origin, it remains to be seen if this initiative will bleed resources and energy from an institution desperately in need of the same. Given the importance of

11. Press Release, Leaders' Joint Statement (Mar. 31, 2006) (<http://www.pm.gc.ca/eng/media.asp?id=1085>).

the relationship between the NAFTA and the SPP, the analysis that follows examines the principal distinctions and overlays between the two frameworks.

II. POST-NAFTA INTEGRATION: THE CONCEPT OF BORDERS AND THE SPP

A. THE CONCEPT OF BORDERS

1. *General*

Ever since their inception, modern states have described themselves as sovereign spatial entities which exercise jurisdiction within the boundaries of their territory. Borders are the ultimate manifestation of their sovereignty. "Sovereignty, though its meanings have varied across history, . . . has a core meaning, *supreme authority within a territory*. It is a modern notion of political authority."¹²

The philosophy of economic integration through cross-border trade is a contrasting paradigm to the concept of borders in that it undercuts the sovereignty of the nation state, or at least its economic incarnation. The general role of states weakens as they increasingly participate in various international institutions and regimes, such as the EU, the WTO, the GATT, and the NAFTA, which in turn ineluctably attenuates their regulatory power. Incontrovertibly, this is one of the fundamental features of the contemporary process of global integration. "One of the central aspects of the "strong" globalization thesis is the argument that States are no longer autonomous actors."¹³ In other words, the decline of the significance of the nation-state and the internalization of governance constitute key characteristics of globalization.

2. *Reinventing the North American Concept of Borders*

In the North-American context, there appears to be emerging a new realm of sovereignty: North American security sovereignty. It is embodied in the idea of reinventing North-American borders by eliminating as many barriers as possible to the movement of people and goods across the internal border and by shifting the emphasis to protection of the approaches to North America.¹⁴ This will be achieved, for instance, by implementing compatible border security measures and real-time information sharing among the North American partners so that they can better screen out high-risk individuals and cargo before they depart for North America. "The SPP's security track seeks, through bilateral and trilateral cooperation, to secure North America from external threats

12. Dan Philpott, *THE STANFORD ENCYCLOPAEDIA OF PHILOSOPHY* (Edward N. Zalta ed. 2003), available at <http://plato.stanford.edu/archives/sum2003/entries/sovereignty/>.

13. Tim Dunne, *Perspectives on Globalization from Developing States*, 7 IND. J. GLOBAL LEGAL STUD. 17, 28 (1999).

14. See Security and Prosperity: Toward a New Canada—U.S. Partnership in North America, *supra* note 7.

through improved intelligence sharing, infrastructure protection, border management, and traveler and cargo security.”¹⁵ Thus in securing a North American perimeter, the politicians have managed to further a specific agenda without having to address the dialogue that normally accompanies efficiency driven policies that ultimately lead to continental integration.

3. *Security of Borders: Flow of Persons and Goods*

In the pursuit of border security thus far, Canada, United States, and Mexico have resorted to a series of incremental initiatives, rather than wide-sweeping perimeter security projects. Such efforts include both Canadian structural transformations as well as coordinated efforts such as the Smart Border Accord and its supportive Action Plan. The original Action Plan contained thirty points, but in December 2002, the scope of the plan was expanded to include two more points: science and technology and biosecurity.¹⁶ The plan was devised to achieve the following objectives:

- (i) The secure flow of people;
- (ii) The secure flow of goods;
- (iii) Investing in infrastructure; and,
- (iv) Coordination and information sharing in enforcement of these aforementioned objectives.¹⁷

Two of these four pillars, namely the flow of goods and the flow of people, will serve as the basis for the discussion that follows respecting the implications of the SPP for the functioning of the North American borders.

B. THE SECURE FLOW OF GOODS

The rapid and assured transit of cross-border goods is a major economic priority for North American trade partners due to the enormous volume of trade that flows between them, in particular between Canada and the United States. The smooth functioning of border crossings is essential to facilitating the continuance of that flow. Following the events of September 11, the increased focus on security concerns inherent in the new norm led both Canada and the United States to revamp their customs procedures, re-align their customs administration and implement new means to ensure that low risk commercial goods would continue to flow unencumbered across the border. For the most part, Canada emulated the United States in re-aligning their executive prerogatives to ad-

15. Press Release, White House Office of the Press Secretary, Security and Prosperity Partnership of North America Security Agenda (Mar. 23, 2005) (http://www.spp.gov/security_agenda/index.asp?dName=security_agenda).

16. Press Release, Public Safety Canada, McLellan and Ridge Highlight Progress on the Smart Border Action Plan (Oct. 14, 2004) (http://www.ps-sp.gc.ca/publications/news/2004/20041014_e.asp).

17. *Id.*

dress the new norm and embarked on targeted initiatives aimed at ensuring that the northern border remained open for business. Some of the U.S. and Canadian trade and security initiatives include Partners in Protection (PIP), Customs-Trade Partnership Against Terrorism (C-TPAT), Advance Commercial Information (ACI), Free and Secure Trade (FAST), and Customs Self Assessment (CSA). Another good example is the fact that both Canada and U.S. Customs have new specific jurisdiction and new names that include security.

1. Trade Liberalization v. Security Compliance Costs

The rationale behind the NAFTA and trade in general is liberalization rather than regulation. Its objective is to “eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties.”¹⁸ The fundamental proposition of the trade doctrine is that goods should be able to cross borders at a tariff-free, competitive price, which in turn would enhance the efficiency and competitiveness of the international market for such products.

On the other hand, security concerns have propelled a move towards more regulation, in this case border regulation. Such regulatory standards would necessarily impose compliance costs on exporters and importers. Generally, harmonization can be propitious for international trade (e.g. the Harmonized Tariff Schedule). But standards harmonization as envisioned by the SPP may impose trade regulatory costs. For example, increased transit times brought about by lengthy border screening measures may increase shipping costs. One such measure may be the U.S.-Canada Great Lakes/St. Lawrence Seaway Enforcement Program, where both governments have pledged to develop coordinated maritime law enforcement against smuggling and trafficking. Further, the adoption of technical standards for imported products, albeit in a harmonized form, may engender greater compliance costs. Additional costs could include driver costs (e.g., compensation and certification), investments in security installations and information systems, and the additional administrative expenses associated with the added paperwork and electronic filing.

To date, only the compliance costs imposed subsequent to the Smart Border Accord have been measured comprehensively. For example, the annual costs incurred by the Canadian trucking industry as a result of U.S. security measures, such as Customs-Trade Partnership Against Terrorism (C-TPAT), Free and Secure Trade (FAST) and the Advanced Electronic Presentation of Cargo Information under the U.S. Trade Act, are in the order of \$290 million per year.¹⁹

18. North American Free Trade Agreement art. 102(1)(a), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

19. Impact of U.S. Import Compliance Programs at the Canada/U.S. Land Border on the Canadian Trucking Industry, <http://www.tc.gc.ca/pol/en/report/BorderStudy/ExSum.htm> (last visited Mar. 25, 2007).

With respect to the measures taken under the SPP, compliance costs can be fully gauged in terms of their impact on trade only after the first collaborative efforts planned under the SPP have been materialized. The current status of the process is described in the Ministers' Report to Leaders on Security and Prosperity Partnership Initiatives from September 7, 2006.²⁰ According to the report, officials from the regulatory, trade, and oversight agencies of all three countries met for the first time on April 18-19, 2006. The three countries discussed their respective regulatory systems and highlighted areas of cooperation. As a result, the three countries identified a core set of elements for the regulatory cooperation framework to include coordinating joint work on regulatory processes, promoting best practices, and enhancing information sharing throughout the regulatory process.

The increase in cross-border costs may result not only from the regulatory compliance burden, but from directly imposed entry fees adopted as a funding mechanism for security measures. The imposition of such entry fees has been announced, for instance, by the U.S. Department of Agriculture, which has served notice of emergency action funded with per trip surcharges that take effect on November 24, 2006.²¹ The entry fee will range from \$5 per air passenger to \$488 for a maritime vessel, with trucks paying \$5.25 and railways \$7.50 per car.²² The funding raised will be used for an expanded agriculture inspection program to screen air travellers and commercial rail, truck, ship and plane deliveries for biohazards.²³

2. *The Benefits of the SPP for Trade*

Some of the accomplishments under the SPP agenda may have a propitious effect on the flow of goods by lowering transportation costs and creating greater efficiencies. Examples of such measures undertaken under the auspices of the SPP include the following:

- The United States and Canada intend to complete a border infrastructure compendium and develop an implementation plan for priority infrastructure investments at key land border ports of entry, improve border trade and traffic information, enhance use of supporting technologies and improve border transportation planning and coordination.
- The United States and Canada reached a full Open-Skies Aviation Agreement, removing all economic restrictions on air service to, from, and beyond one another's territory by the airlines of both

20. News Release, CCN Mathews, Ministers Report to Leaders on Security and Prosperity Partnership Initiatives (Sept. 7, 2006) (<http://www.ccnmatthews.com/news/releases/show.jsp?action=showrelease&actionFor=611059dsearchText=false&showText=allb>) [hereinafter Minister's Report].

21. Steven Chase, *Business Leaders Urge a Fight Against New U.S. Border Rules, Fees*, GLOBE AND MAIL, Sept. 9, 2006, available at http://www.theglobeandmail.com/servlet/Page/document/v5/contentsubscribe?user_URL.

22. *Id.*

23. *Id.*

countries. The Agreement will encourage new markets development, lower prices and greater competition. The Agreement was initialled in November 2005, and is expected to take effect in September 2006.²⁴

- To promote prosperity by reducing the costs of trade, the United States and Canada decreased transit times at the Detroit/Windsor gateway, our largest border crossing point, by 50 percent.²⁵ Furthermore, on September 6, 2006, “[T]he governments of Canada and Ontario announced the start of a foundations investigations study that will lead to a better understanding of the bedrock stability in areas where a new international bridge spanning the Detroit River could be located.”²⁶
- To support increased trade and expedite secure processing of cross-border trade and travel between Mexico and the United States, six FAST (Free and Secure Trade)/Express lanes are operating at the U.S.-Mexico border, a new lane in Nogales will open soon, and we are working on a project for a lane in Matamoros. Exclusive lines and schedules will be implemented at nine crossings.²⁷
- There is a plan to build a vast NAFTA Super Highway, through the heart of the U.S. along Interstate 35, from the Mexican border at Laredo, Texas, to the Canadian border north of Duluth, Minnesota.

C. THE SECURE FLOW OF PEOPLE

It is important to note that the SPP regards security as a means to an end. The ultimate objective, at least in so far as illustrated by the political language of the document, is the prosperous development of North America.²⁸ The aim of the initiative is to empower the people living in North America, through enhanced higher education, academic exchanges, and common research and development initiatives, to better prepare for the future.²⁹ In order to work towards this common goal, the people of North America require the ability to move between borders.

24. Press Release, White House Office of the Press Secretary, *The Security and Prosperity Partnership of North America: Next Steps* (Mar. 31, 2006) (<http://www.state.gov/p/wha/rls/prsr/2006/q1/69852.htm>) [hereinafter *Next Steps*].

25. *Id.*

26. Press Release, Communiqué, Canada and Ontario Begin Foundations Investigation Study for New Windsor-Detroit International Crossing (Sept. 6, 2006) (http://www.partnershipborderstudy.com/pdf/060906_FoundationsInvestigations_PressRelease-English.pdf).

27. *Next Steps*, *supra* note 24.

28. Press Release, White House Office of the Press Secretary, *International Information Programs, North American Prosperity Depends on Security*, (Mar. 23, 2005) (<http://usinfo.state.gov/wh/Archive/2005/mar/23-12996.html>).

29. Press Release, SPP.Gov, *Report to Leaders, Security and Prosperity Partnership of North America: Report to Leaders* (June 27, 2005) (http://www.spp.gov/report_to_leaders/index.asp?dName=report_to_leaders) [hereinafter *Report to Leaders*].

1. *Legitimate v. Illegitimate Travel: Practical Difficulties in Establishing a Clear Demarcation Between the Two*

The prevalent language employed by the SPP with respect to the movement of people reveals two interrelated goals—to facilitate the travel of low-risk, legitimate, trusted travellers, and to prevent high-risk travellers from taking advantage of the existing opportunities for cross-border movement. To this end, by way of example, the SPP contemplates programs to substantially reduce transit times and border congestion, such as partnering with state, provincial and local governments and the private sector to establish low-risk port of entry pilots for the exclusive use of those enrolled in the trusted trade and traveler programs. Another example is the Western Hemisphere Travel Initiative's goal to enhance screening of travelers into the U.S. and to facilitate low-risk traffic. The three partners of the SPP have agreed to create a single, integrated program for North American trusted travelers by 2008; officials are currently developing security standards for travel documents.³⁰ Individuals applying for trusted traveler status would be able to apply for the program and pay relevant fees in one transaction. Enrolled participants would have access to all established trusted travel lanes at land crossings, airports and marine programs.

To date, there has not been formulated a uniform, comprehensive definition of legitimate or trusted travel. The real impact of the SPP trusted travelers programs on trade will depend on a multitude of aspects: will the scope of legitimate travellers be delineated in such a restrictive way as to potentially exclude persons involved in valid cross-border trade enterprises? What body/institution will be given the authority to decide who will be granted access to the legitimate travel program? How will the program be executed at the border technologically?

The NAFTA also recognizes the importance of border security in the context of the movement of people. Article 1601, which sets out the general principles for the chapter on the temporary entry of business persons, reflects the need to ensure border security. Further, article 1603 requires each party to the NAFTA to grant temporary entry to business persons, who are otherwise qualified for entry under applicable measures relating to public health and safety and national security. But the NAFTA stops short of defining these applicable measures. It employs different terminology—it refers to the general category of BUSINESS PERSON (a citizen of a party who is engaged in trade in goods, the provision of services or the conduct of investment activities). The SPP, in contrast, goes one step further in that it attempts to merge the goals of the movement of people and national security. It views these two goals inseparably, as inextricably linked components of the same objective.

30. Ministers' Report, *supra* note 20.

2. *Mexican v. Canadian Border: Different Security Concerns*

One of the potential perils of the SPP border strategy is that it fuses two distinct efforts for enhancing border security—one related to the U.S.—Mexico border and the other to the U.S.-Canada border. The two are characterized by problems of dissimilar nature, and thus they may not be amenable to a singular solution. Accordingly, the SPP's attempt to resolve both within the same framework is inherently laden with difficulty. To this end, the Partnership stipulates different approaches to the concerns relating to the U.S. borders with Mexico and Canada. On the one hand, U.S. security concerns arising from the relationship with Mexico fall predominantly within the objective of promoting the border security between the two countries. Some examples of cooperative measures to this end within the SPP framework are the following:

- To increase border security, Mexican and U.S. agencies are harmonizing risk assessment mechanisms, exchanging information, and establishing protocols to facilitate detection of fraud and smuggling.³¹
- To address border violence, the United States and Mexico signed an Action Plan to Combat Border Violence and Improve Public Safety. Officials of the two countries in Nogales, AZ, Nogales, Sonora and Laredo, TX, Nuevo Laredo completed protocols on border security and public safety.³²
- Under the United States-Mexico Voluntary Repatriation Program, more than 35,000 persons, including 20,500 in 2005, were returned to their home in a secure, legal, and humanitarian way.³³
- With the goal of enhancing public safety along the U.S.–Mexico border, the United States and Mexico agreed to establish a standardized Alien Smuggler Prosecution Programs along the Southeast border.³⁴
- New secure SENTRI travel lanes will be constructed by 2006, and the United States and Mexico will work toward implementation of a secure cross-border commuter service between El Paso and Ciudad Juárez.³⁵

The goal of the border security measures that the SPP provides for in respect of the U.S.-Mexico border is the prevention of the illegal cross-border flow of people prompted by the migratory pressures of the economic conditions as between the two countries. These migratory pressures are further propelled by the increasing numbers of undocumented migrants from countries other than Mexico who use that country as a transit point to the United States. Individuals from more than sixty countries are typically held in Mexico City's migrant detention centre on any given day, and the arrest rate along the U.S.-Mexico border of what the Border Patrol calls "Other than Mexicans" has increased in recent years.

31. Next Steps, *supra* note 24.

32. *Id.*

33. *Id.*

34. Report to Leaders, *supra* note 29.

35. *Id.*

While most of these individuals are jobseekers from Latin America, others come from countries that may be of concern to U.S. national security interests.³⁶

Ultimately, the SPP does not address the root cause of the undocumented migration between the United States and Mexico, and as such is not capable of securing the border against such migratory movement. Real security and prosperity for all three NAFTA partners requires incorporating an agreement on labour migration into the project of North American economic integration. The process of North American integration has created the structural conditions that spur migration. This assertion follows from the principle that when weak economies are exposed to vast competitive pressures generated by liberalized trade and the free flow of goods and services, they in turn tend to cause pressures for migration themselves. In the specific context of the NAFTA, this paradigm is exemplified by the uneven effects of the NAFTA on the Mexican economic demographics, particularly in rural areas and marginalized groups that tend to migrate to the United States.³⁷ Overall, since the NAFTA was signed, the wage disparity in Mexico has worsened.³⁸ Since the inception of the NAFTA, the rural poverty rate in Mexico has risen and real manufacturing wages are almost 11 percent lower than when the agreement came into effect.³⁹

Neither the NAFTA, nor the new SPP, address the need for a more integrated continental regulation of labour migration. The NAFTA's attempt at such regulation consisted mainly of the adoption of the North American Agreement on Labour Cooperation, whose principal objective is to improve the working conditions and living standards in each Party's territory. Similarly, the measures which have been and will be undertaken pursuant to the SPP are confined to the border ramifications of the migratory pressures and are not directed at the reasons for these pressures. As a consequence, it is highly implausible that the Partnership, at least in its present form, will provide a long-term solution to the U.S.-Mexico border security concerns.

On the other hand, in respect of its border with Canada, the United States has placed the emphasis on what categories of people Canada admits from outside of North America, rather than on specific border measures designed to manage the cross-border movement of people between the two countries. This goal has been pursued by collaborative efforts

36. See Michael Flynn, *Who's Trying to Cross Our Southern Border? Everyone*, WASHINGTON POST, Dec. 11, 2005, at B1.

37. ROBERT A. PASTOR, *TOWARD A NORTH AMERICAN COMMUNITY: LESSONS FROM THE OLD WORLD FOR THE NEW* (Washington, DC: Institute for International Economics 2001).

38. Gordon H. Hanson, *What Has Happened to Wages in Mexico since NAFTA?* 26–27 (Cambridge, MA: Nat'l Bureau of Economic Research, Working Paper No. 9563, March 2003).

39. J. Enrique Espinosa, et al., *Happily Ever NAFTA?*, FOREIGN POLICY, September/October 2002 at 2.

directed at harmonizing the treatment of non-North American aliens by the two countries:

- To strengthen the integrity and security of asylum and refugee status determination systems, the United States and Canada launched a pilot project to share information on refugee and asylum claimants based on a comparison of fingerprint records.⁴⁰
- Refugee/Asylum Processing: to review refugee/asylum practices and procedures to ensure that applicants are thoroughly screened for security risks and take necessary steps to share information on refugee and asylum claimants.⁴¹
- To negotiate a safe third-country agreement to enhance the managing of refugee claims (see more on that).
- Visa policy coordination: to initiate joint review of respective waiver lists and share look-out lists at visa issuing offices.⁴²

This political pattern is similar to the development of the EU regulatory framework for immigration and asylum issues, particularly after the legislative reforms in 1999 according to which the domain of immigration and asylum became a Community responsibility as opposed to an inter-governmental matter.⁴³ But given the level of integration within the EU, such harmonized immigration and asylum policy appears to be a natural corollary to the economic unification of the Union. In contrast, the North-American political landscape does not evince such deep economic and political integration. In this respect, it can be argued that the SPP and the Action Plan attach an additional, political dimension to the economic cooperation spurred by the NAFTA.

III. REGULATORY RELATIONSHIP BETWEEN THE NAFTA AND THE SPP: NAFTA-PLUS STATUS?

A. REGULATION OF SECURITY BY THE INTERNATIONAL TRADE REGIME

Both the NAFTA and the GATT contain provisions for the availability of trade-restrictive government measures imposed on national security grounds. Under both treaties, states are permitted to adopt or enforce measures necessary to protect human, animal or plant life or health.⁴⁴ Further, Article 2102 of the NAFTA provides:

40. Next Steps, *supra* note 24.

41. Press Release, White House Office of the Press Secretary, U.S.-Canada Smart Border/30 Point Action Plan Update (Dec. 6, 2002) (<http://www.whitehouse.gov/news/releases/2002/12/print/200212061.html>).

42. *Id.*

43. See Council Directive 2003/86/EC, 2003 O.J. (L251) 12 (on the right to family reunification); Council Directive 2005/85/EC, 2005 O.J. (L236) 13 (on minimum standards on procedures in member states for granting and withdrawing refugee status); Council Directive 2003/109/EC, 2004 O.J. (L16) 44 (concerning the status of third country nationals who are long-term residents).

44. See General Agreement on Tariffs and Trade arts. 20, 154, Jan. 1, 1948, 55 U.N.T.S.; NAFTA, *supra* note 18, art. 2101.

1. Subject to Articles 607 (Energy - National Security Measures) and 1018 (Government Procurement - Exceptions), nothing in this Agreement shall be construed:

(a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;

(b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests

(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,

(ii) taken in time of war or other emergency in international relations, or

(iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or

(c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.⁴⁵

But security justifications cannot be used as disguised restriction on international trade.

In view of the above provisions, it can be discerned that the NAFTA views national security as an exception to its regulatory scope. In other words, national security does not form a focal point of governance under the Agreement. Given this limited ambit of security-related provisions in the NAFTA, it should not come as a surprise that in a post-September 11 world, security issues, which have taken on a new magnitude, had to be addressed outside of the NAFTA. In the SPP, the 'exception' relating to national security has become the dominant consideration. This signifies the critical shift in focus in the process of North-American integration and highlights once again the proactive-reactive dichotomy elucidated above.

B. THE EXISTING FRAMEWORK FOR NEGOTIATIONS

The initial philosophy of the NAFTA was not only to create a regime governing the trade relationship between the parties, but also to "establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement."⁴⁶ Still, the parties did not resort to the existing framework in negotiating the terms of the SPP, which inherently has trade implications and specifically addresses matters under the purview of the NAFTA.

In view of the outstanding trade issues plaguing the North American trade bloc, for example the issue relating to softwood lumber, it would be

45. NAFTA, *supra* note 18, art. 2102.

46. NAFTA, *supra* note 18, art. 102(1)(f).

logical to expect that any further negotiations between the NAFTA parties would aim to address those issues. Given the impetus for an integrated hemispheric trading regime, it is incumbent that these parties, as a dominant weight in the hemisphere, deal with the underlying issues and inequities that exist in the current regime. While the increasing economic integration as a result of the NAFTA poses growing challenges to Mexico and Canada in light of U.S. security concerns, this need not be the case. Border security can, in effect, give added leverage to negotiate reforms in U.S. policies long resistant to change. Still, the new SPP does not endeavour to tackle these issues. They are being dealt with outside of the partnership. For example, the United States and Canada are in the process of entering a softwood lumber agreement, and the legal text was signed by Canadian international trade minister David Emerson and United States trade Representative Susan Schwab on September 13, 2006 in Ottawa.

It is difficult to conclude that the NAFTA negotiation framework is not an appropriate forum for pursuing a competitive North-American market environment, yet the current legislators seem to be pulling away from this established forum as a mechanism to create a global trading bloc to face regional competitive strength. In fact, the very impetus for signing the agreement was economic growth and increased investment opportunities. It is unsustainable to maintain that there is distinction between these objectives and the pursuit of competitiveness.

This compartmentalization of the SPP, without its integration within the legal and institutional framework of the NAFTA, has the potential of rendering the NAFTA useless. This is increasingly important since the NAFTA, while providing for preferential tariffs and access, also affords a great deal of protection against trade remedies. In the face of U.S. security concerns, the existing degree of North American integration has rendered discussions of whether or not further integration should take place moot. The subordination of notions of prosperity, without effectively addressing the underlying issues that loom over our trading relationship, poses an inherent danger to the North American trading regime. Canada's experiences with the NAFTA to date are indicative of this danger.

C. THE SPP AND THE NAFTA: COMMONALITY OF ISSUES

1. *Rules of Origin*

The Rules of Origin are an essential part of the NAFTA as they govern the qualification of goods for duty-free treatment under the agreement. Chapter four of the NAFTA contains a comprehensive regime for the rules of origin applicable to the cross-border flow of goods within the North-American market. Notwithstanding this clear mandate conferred upon the NAFTA framework, the SPP agenda includes, as one of its primary objectives, the liberalization of the rules of origin.⁴⁷ According to the Report, the work under the auspices of the SPP is intended to com-

47. Report to Leaders, *supra* note 29.

plete the modifications of the rules of origin, covering such goods as household appliances, precious metals, and various machinery and equipment parts. These changes will affect U.S. \$ 20 billion of annual trilateral trade. The logical question then arises as to why the Rules of Origin are dealt with under the auspices of the SPP since the governing treaty in this regard is the NAFTA. Is this a concealed attempt by the United States to redesign the trade framework under the NAFTA by placing trade issues on a completely different platform?

2. *Compatibility of Regulations and Standards*

Regulatory cooperation is one of the main themes underpinning the SPP. The goal is to attain compatibility of standards-related measures respecting products. For example, such cooperation is envisaged with respect to the public health and safety protection related to consumer products, as well as textiles and apparel labelling. To ensure food safety while facilitating trade, a Food Safety Coordinating Task Force was formed with the mandate of developing a list of standards to compare for similarities, differences and scientific bases for the differences.⁴⁸

On the other hand, the NAFTA contains similar provisions. Article 906, Compatibility and Equivalence, provides the following:

1. Recognizing the crucial role of standards-related measures in achieving legitimate objectives, the Parties shall, in accordance with this Chapter, work jointly to enhance the level of safety and of protection of human, animal and plant life and health, the environment and consumers.
2. Without reducing the level of safety or of protection of human, animal or plant life or health, the environment or consumers, without prejudice to the rights of any Party under this Chapter, and taking into account international standardization activities, the Parties shall, to the greatest extent practicable, make compatible their respective standards-related measures, so as to facilitate trade in a good or service between the Parties.⁴⁹

Upon reading of the two documents (SPP and NAFTA) together, there seems to be a significant overlay of purpose and methodology in respect of the adoption of uniform standards-related measures. This, in turn, poses the question as to why regulatory cooperation comes under the umbrella of the SPP, since its natural placement is within the purview of the NAFTA. The difference is merely in the acuteness of the language, rather than one of semantics. The NAFTA uses the term safety whereas the SPP is concerned with security. The question is even more justified having regard to the already existing Committee on Standards-Related Measures under the NAFTA. One of the Committee's main functions is to facilitate the process by which the Parties make compatible their stan-

48. Next Steps, *supra* note 24.

49. NAFTA, *supra* note 18, art. 906.

dards-related measures.⁵⁰

D. SPP AND TRADE-RELATED BUDGETARY COMMITMENTS

The significance of the SPP in the context of North-American integration can be measured by another determinant—the amount of budgetary funds committed to it. For example, the most recent Canadian Federal Budget pledged Canadian \$303 million over two years to further the SPP initiative of promoting the movement of low-risk trade and travellers within North America. This strategy includes the following key activities, as well as other efforts related to emerging SPP priorities:

- Enhancing Cargo Security and Expediting Processing at the Border;
- Better technology to Identify High-Risk Travellers and Better Procedures to Expedite Low-Risk Travellers;
- Working with Partners to Assess and Respond to Threats.⁵¹

To provide a context for this budgetary figure, this Canadian \$303 million represents more than 20 percent of the total allocation for security, which includes a wide range of programs such as “Cracking Down on Crime” (the allocation for which is less than Canadian \$303 million), “Pandemic Preparedness”, and “Strengthening Canada’s Role in the World.”⁵² By comparison, the 2005 Budget provided \$433 million over five years to further strengthen the capacity of the Canadian Government to deliver secure and efficient border services.⁵³

The 2006 federal budget also allocated the following amounts to trade-related programs:

- Canadian \$172 million over two years to harmonize security regulations for cargo in all modes of transportation.
- Canadian \$26 million over two years to design and pilot an air cargo security initiative.
- Canadian \$5 million over two years to support Canada Border Service Agency’s Partners in Protection Program to explore greater links with the U.S. Customs-Trade Partnership Against Terrorism Program.
- Canadian \$26 million over two years to enhance the capacity to cope with high-risk situations at the border through joint training exercises with the U.S.
- Canadian \$1 million per year for a Canada-U.S. joint vulnerability assessment program. Canadian \$101 million to arm Canadian border officers and provide necessary training.⁵⁴

50. NAFTA, *supra* note 18, art. 913(2)(b).

51. DEPARTMENT OF FINANCE, CANADA, THE BUDGET PLAN 132–33 (2006) [hereinafter BUDGET 2006].

52. *Id.* at 126–27.

53. DEPARTMENT OF FINANCE, CANADA, THE BUDGET PLAN 227 (2005).

54. BUDGET 2006, *supra* note 52, at 126–133.

- Canadian \$2.4 billion over the next five years for new highways and border infrastructure⁵⁵
- Canadian \$591 million over the next eight years in Canada's Pacific Gateway⁵⁶

For the most part, all trade-focused budgetary allocations appear in the section under the heading "Security."

E. THE MANAGEMENT OF TRADE DISPUTES

Issues pertaining to trade disputes were expressly omitted from the SPP. The parties instead agreed to address matters pertaining to trade disputes through existing treaties, namely the NAFTA.⁵⁷ By not expressly including a dispute resolution mechanism, or referencing an existing one, the obligations of the SPP will not be susceptible to challenge; only its effect on entrenched obligations will be. While the lack of a dispute mechanism substantiates the claim that the SPP is merely a framework, one must question if the establishment of such a framework further degrades the existing dispute settlement process, which has come into question due to its inability to resolve the Canada-U.S. Softwood Lumber dispute.

F. INSTITUTIONALIZATION OF THE PRIVATE SECTOR WITHIN THE SPP MODEL: THE NORTH AMERICAN COMPETITIVENESS COUNCIL

Article 2001 of the NAFTA establishes a Free Trade Commission, which is charged with supervising the implementation of the Agreement and overseeing its further elaboration.⁵⁸ The Commission is comprised of cabinet-level representatives of the parties or their designees. In actuality, the Commission has amounted to nothing more than a periodic gathering of trade ministers.⁵⁹ There is no provision for the formal participation of the private sector in the trilateral relationship among the NAFTA parties.

The SPP, on the other hand, officially institutionalizes the input and involvement of private business in the trilateral negotiation process among the Partners to the SPP. This was achieved through the establishment of the North American Competitiveness Council (NACC). The driving force behind the creation of the NACC is the notion that adding high-level business input and increasing private sector engagement in the SPP will assist governments in enhancing North America's competitive position. To this end, the NACC is endowed with the responsibility to:

55. *Id.* at 118.

56. *Id.*

57. See Press Release, White House Office of the Press Secretary, Fact Sheet: Security and Prosperity Partnership of North America (Mar. 23, 2005) (<http://www.whitehouse.gov/news/releases/2005/03/20050323-4.html>).

58. NAFTA, *supra* note 18, art. 2001.

59. See Press Release, Foreign Affairs and International Trade Canada, NAFTA Free Trade Commission Joint Statement (July 16, 2004) (<http://www.dfait-maeci.gc.ca/nafta-alena/JS-SanAntonio-en.asp>).

- Consider issues that could be addressed trilaterally or bilaterally, as improvements in our bilateral relationships enhance North American competitiveness.
- Address issues of immediate importance and provide strategic medium and long-term advice.
- Provide input on the compatibility of our security and prosperity agendas, given the linkages between security and prosperity in a global marketplace.
- Offer ideas on the private sector's role in promoting North American competitiveness.⁶⁰

At the Cancun press conference on March 31, 2006, Canada's Prime Minister, Stephen Harper confirmed that the decision had been reached to advance SPP by forming the NACC:

During my meetings with Presidents Bush and Fox, we reviewed the progress of our Security and Prosperity Partnership, which provides a framework to advance the common interests in the areas of security, prosperity, and quality of life. We committed to further engage the private sector. We've agreed to set up a North American Competitiveness Council, made up of business leaders from all three countries, to advise us on ways to improve the competitiveness of our economies. They will meet with our ministers, identify priorities, and make sure we follow up and implement them.⁶¹

Thus far, there has not been officially published information respecting the membership requirements, the selection process, or the terms of the members appointed to the NACC. There exists no charter for the NACC, nor any specific delineation of roles and responsibilities. Further, there is no reporting authority or mechanism. Still, according to the official rhetoric, the NACC is "an umbrella organization within the SPP" and "nothing like the NACC had ever before been created in the NAFTA."⁶²

More information about the Council became available after its first, and thus far only, meeting, which took place on June 15, 2006. The members of the U.S. section of the North American Competitiveness Council (NACC) are Campbell Soup Company, Chevron, Ford, FedEx, General Electric, General Motors, Kansas City Southern Industries, Lockheed Martin Corporation, Merck; Mittal Steel USA, New York Life; United Parcel Service, Wal-Mart, and Whirlpool.⁶³ On the Canadian side of the Council are companies such as Manulife Financial, Power Corporation of

60. Next Steps, *supra* note 24.

61. Press Release, White House Office of the Press Secretary, President Bush, President Fox of Mexico, and Prime Minister Harper of Canada in Press Availability (Mar. 31, 2006) (<http://www.whitehouse.gov/news/releases/2006/03/print/20060331-4.html>).

62. Jerome R. Corsi, *Bush Administration Fast-Tracks Formation of North American Union* HUMANEVENTS.COM, Nov. 2006, <http://www.humanevents.com/article.php?id=15954>.

63. MEMBERS OF THE U.S. SECTION OF THE NORTH AMERICAN COMPETITIVENESS COUNCIL 1, *available at* <http://www.counciloftheamericas.org/coa/NACC/NACC%20Members%20Updated.pdf> (last visited Mar. 25, 2006).

Canada, Suncor Energy, Canadian National Railroad Company, Bell Canada Enterprises (BCE), Home Depot Canada, and Scotiabank.⁶⁴

One commentary with respect to the formation of the NACC is of particular interest given that it was authored by one of the scholars, namely Robert Pastor, who fervently encouraged the creation of such an institution. Robert Pastor is the co-author of *Building a North American Community: Report of the Independent Task Force on the Future of North America*.⁶⁵ At a press conference presenting the report, he stated:

The North American summit that occurred in Texas on March 23 is a very important statement. But if it's to be more than a photo opportunity, we felt that a second institution was essential, and that would be a North American advisory council made up of eminent individuals, appointed for terms that are longer than those of the governments, and staggered over time. This council would propose ideas for dealing with North American challenges, whether they are regulatory or transportation or infrastructure or education, and put forth options to the three leaders to consider ways to adopt a North American approach.⁶⁶

IV. TRADE AND SECURITY IN THE CONTEXTS OF MERCOSUR

It is trite to say that there are varying degrees of integration spurned by a trading relationship. While North American has thus far chosen not to reach a level of integration to qualify as a customs union, certain South American countries have. MERCOSUR, made up of Argentina, Brazil, Paraguay and Uruguay, was created with the explicit intention of creating a common market and a common external tariff, but also provides a platform for member states to discuss common security issues such as drug trafficking.⁶⁷ The relationship between security and trade within the framework of MERCOSUR dates back to its very origins. One of the initial purposes of the agreement was to reduce tensions between Argentina and Brazil. Subsequently, according to some scholars, the agreement helped to avert a possible military coup in Paraguay in 1996 following reaffirmation by the presidents of the MERCOSUR countries that de-

64. U.S. CHAMBER OF COMMERCE, SPIRIT OF ENTERPRISE, FIRST SSP MINISTERIAL MEETING WITH THE NORTH AMERICAN COMPETITIVENESS COUNCIL 5 (June 15, 2006) available at <http://www.counciloftheamericas.org/coa/NACC/NACC5.pdf>.

65. JOHN MANLEY, PEDRO ASPE, ROBERT A. PASTOR, & WILLIAM F. WELD, BUILDING A NORTH AMERICAN COMMUNITY: REPORT OF THE INDEPENDENT TASK FORCE ON THE FUTURE OF NORTH AMERICA (Council on Foreign Relations May 27, 2005) available at http://www.cfr.org/publication/8138/building_a_north-american_community.html.

66. *Id.*

67. OLI BROWN ET. AL, REGIONAL TRADE AGREEMENTS: PROMOTING CONFLICT OR BUILDING PEACE 9 (International Institute for Sustainable Development October 2005), available at http://www.iisd.org/pdf/2005/security_rta_conflict.pdf#search=%22%22Trade%20and%20Security%22%20Mercosur%20%22.

mocracy was a necessary condition for membership.⁶⁸ In forming free trade areas with MERCOSUR, Chile and Bolivia also accepted democracy as a condition for membership.⁶⁹

The MERCOSUR countries face security threats of a different character, and hence security cooperation among them adopts a different agenda. These security threats include drug trafficking, money laundering, urban violence and criminality; increasing privatization of security agencies and a lack of effective control over their operations; an increase in armed violence related to drug trafficking; problems with corruption in security and justice institutions; legislative loopholes and lack of operational mechanisms to enforce compliance.⁷⁰ In order to reduce problems related to armed violence and arms trafficking, the parties to MERCOSUR have broadly suggested the following lines of action: increasing controls on private security agencies; introducing legislation on arms controls at the national and regional levels, including regulations on seizures, stockpiling and destroying excess stocks of arms; and the need for convergent security policies at the regional level in order to facilitate information sharing and cooperation.⁷¹

In 2005, the Paraguayan Parliament's granted immunity for the installation of a U.S. military base in Paraguay. In reaction to that, at a meeting of the Brazilian Senate,

Workers Party senator Jefferson Peres proposed that, just as the MERCOSUR countries signed a democratic clause, which pronounces that no dictatorship may be part of the bloc, they should also approve "another clause stating that third countries [without naming the U.S.] may not establish permanent bases in any of the member states, without prior consultation and approval of all members" of MERCOSUR.⁷²

But no action was taken in that direction.

Like the SPP, there is a quest within MERCOSUR to reach accords on infrastructure works, such as Bolivia's corridor to the sea, that are to the exclusive benefit of the larger country. A good example is the recent

68. See Presidential Declaration, The Democratic Commitment in MERCOSUR (June 25, 1996, San Luis, Argentina); see also U.S. Dept. of State, Bureau of Western Hemisphere Affairs, Background Note: Paraguay, <http://www.state.gov/r/pa/ei/bgn/1841.htm> (last visited Mar. 25, 2007).

69. Ushuaia Protocol on Commitment to Democracy in Mercosur, the Republic of Bolivia, arts. 1, 3-7, July 24, 1998, <http://www.ohchr.org/english/> (select "Issues"; scroll down, select "Democracy"; then "Compilation of documents or texts adopted . . ."; scroll down, under "Americas," select the Ushuaia Protocol).

70. LATIN AMERICAN FACULTY OF SOCIAL SCIENCES, BUILDING A NETWORK FOR SMALL ARMS CONTROL IN MERCOSUR: WORKSHOP REPORT 2 (International Action Network on Small Arms (IANSA) June 19-20), <http://www.iansa.org/regions/samerica/ba-consult.pdf>.

71. *Id.*

72. Razl Zibechi, *World Prout Assembly, The Installation of a U.S. Military Base in Paraguay: A Wedge in Mercosur*, AGENCIA LATINOAMERICANA DE INFORMACION (ALAI), Nov. 29, 2005, http://www.worldproutassembly.org/archives/2005/12/the_installatio.html (quoting Jefferson Peres, Workers Party Senator).

commencement of the Inter-Oceanic Highway. This 2,600 kilometre roadway, which in two years will join the Atlantic and Pacific oceans and connect three Peruvian ports with the Brazilian port of Santos, is budgeted at approximately \$1 billion. Brazil will contribute 70 percent of the cost, but will be its principal beneficiary, because it is increasing its trade considerably with Asian countries, particularly China.

Unlike the NAFTA, MERCOSUR, from its inception, has been viewed not only as a means of pursuing trade liberalization and economic integration, but also as a security instrument. To date, MERCOSUR has focused attention on issues of counterterrorism (there is a Special Working Group established for this purpose), border management and law enforcement cooperation. Information and intelligence sharing has evolved into an extensive network, at least on the security side. Less developed are the military and defense linkages within MERCOSUR, where formal agreements give way to informal dialogue and communications.⁷³ Addressing border security within the context of a customs union is more fluid than doing so within the context of a regional trading relationship. At its core, a customs union accepts commonality at its borders.

V. CONCLUSION

The SPP was created in recognition of the reality that in dealing with any issue of significance, account must be taken of the relationship of that issue to security. Thus, the question is not whether security trumps trade but rather, how trade can continue to be facilitated given the new security paradigm. Security considerations have become an inextricable part of trade-driven economic integration, as well as of any other endeavour with potential implications for the safety of the people of North America, and increasingly of other parts of the world. By taking further continental integration out of the trade context, and placing it in the security context, integrationists have changed the debate, and, given the lack of attention paid to the SPP by the traditional critics of further integration, the drafters have done so in a manner by which the critics have been silenced. The events of September 11, 2001 altered the ways in which we conduct our political, business and even personal affairs. But above all, these events challenged our outlooks, perceptions, and values. They transformed the normative framework in which we had come to view our world, and the manner by which we endeavour to resolve the problems we face today. Security is now an ineluctable part of our twenty-first century framework, an indispensable element of the solution-seeking process.

73. Policy Paper, Juan Pablo Soriano & Donald R. Mackay, FOCAL: Canadian Foundation for the Americas, *Redefining Hemispheric Security After September 11*, 3 (March 2005) <http://www.focal.ca/pdf/hsecurity03.pdf#search=%22mercosur%20security%22%22>.

Comment and Casenotes

